PPG Industries, Inc. *and* International Chemical Workers Union, Local 45, AFL-CIO. Case 6-CA-12727

March 26, 1981

DECISION AND ORDER

On June 10, 1980, Administrative Law Judge Charles M. Williamson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed limited cross-exceptions and a brief in support thereof and in partial support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint herein alleges that the Respondent failed to bargain collectively by refusing to furnish the Union with certain work evaluation reports, called rating sheets, and related documents concerning temporary summer employee Emily Mitchell, whose premature "release" for unsatisfactory job performance the Union is attempting to grieve.

The Respondent concedes that it refused to furnish the requested information, contending that the information sought is not relevant to the Union's responsibilities as the statutory representative of the Respondent's production and maintenance employees and further that, even if it were relevant, the Union has clearly and unmistakably waived its right to it.

Specifically, as to relevancy, the Respondent asserts that Mitchell's status as a temporary summer employee does not warrant her inclusion in the unit represented by the Union, that indeed no unit determination requiring the inclusion of temporary summer employees has ever been made, and therefore that neither the information sought, involving the work performance record of a nonunit employee, nor the tenure of that individual relates to matters concerning which the Respondent has an obligation to bargain. The Respondent, in challenging the relevancy of the information sought, also asserts that there is no showing that it relied on the documents in question in deciding to terminate Mitchell.

Alternatively, the Respondent contends that the Union has waived whatever right it may have had to the requested information, as evidenced by the labor agreement applicable hereto and by the parties' conduct during their long history of collective bargaining.

Having considered the broad standard of relevancy applicable to requests for information bearing upon the underlying grievance herein,[1] but without addressing the questions raised by the Respondent's "bargaining-unit" contention, the Administrative Law Judge held that the information requested by the Union is clearly relevant in this case. We agree.

Moreover, our conclusion in this regard is not altered by the fact that, arguably, Mitchell and the other temporary summer employees would not have been included in the unit here involved, and therefore would not be covered by the labor agreement, as the Respondent asserts, were the Board to have initially passed on the matter in a determination of the unit appropriate for the purposes of collective bargaining. For the parties have since evidenced by their conduct their intention to treat temporary summer employees as if they were included, and we so find. Thus, as found by the Administrative Law Judge, the Respondent permitted the Union to meet with the newly hired summer temporaries, solicit their membership in the Union, encourage them to sign dues-checkoff authorizations—indeed making payroll deductions when so authorized—and, finally, permitted the Union to represent temporaries in the prosecution of grievances.[2] In these circumstances, we reject the Respondent's contention that the summer temporaries, who clearly perform work covered by the contract, are nevertheless excluded from the unit here in question, as evidenced by their failure to qualify for certain perquisites and fringe benefits enjoyed by others under the collective-bargaining agreement. Accordingly, we find that the information requested by the Union is relevant to matters concerning which the Respondent has an obligation to bargain.

There remains only the question whether the Union has clearly and unmistakably waived its statutory right to the requested information.[3] The Ad-

[1] See *Safeway Stores, Inc.*, 236 NLRB 1126 (1978), and the cases cited therein.

[2] In addition to the Cross grievance, discussed *infra*, the record reveals that in 1975 the Union represented Steve McDiffitt, a temporary employee, at a second-step hearing in connection with his grievances over a disciplinary supension. Significantly, in neither case did the Respondent assert that the grievance was inappropriate because the grievant was outside the bargaining unit.

[3] We find no merit in the Respondent's additional argument that to require the production of the requested rating sheets would contravene the Board's policy of discouraging unreasonably broad prearbitral disclosure. To the extent that the Respondent relies on *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978), in support of this argument, such reliance is misplaced. In that case, the Board held that the statutory obligation to furnish information does not extend to requests for witness statements obtained during the course of an employer's investigation of employee misconduct. There is a fundamental difference between those statements and the information sought herein. In this case, possession of Mitchell's rating

Continued

ministrative Law Judge concluded that it had. In this respect, he found that in 1956, some 23 years prior to the events giving rise to this proceeding, the parties entered into an agreement, in settlement of a controversy concerning the discharge of a temporary employee, which in part provided that such employees shall have no recourse to the grievance and arbitration provisions of their labor contract. Inferentially, the Administrative Law Judge also found that this agreement was carried over, without any material modifications, into the parties' current contract. We disagree.

Examination of the 1956 "settlement agreement," to which the Administrative Law Judge refers and upon which his findings and conclusions are based, establishes beyond doubt that the document in question is no more than an "Industrial Relations Report" prepared contemporaneously by an unidentified agent of the Respondent covering the "Regular Union-Management Semi-Monthly Meeting" held by the parties on August 21, 1956.[4] The report summarizes discussions pertaining to a variety of plant problems including one captioned: "Discharge of Plant Probationary Employees."[5] Therein, the Respondent stated that a controversy had arisen over the "discharge" of one Cross (a temporary employee), with the Union taking the position that this individual should have been "released" in accordance with contract provisions applicable to probationary employees[6] and not "discharged for just cause" under another provision of the agreement.[7] The report also stated that, although, in the future, the Respondent would process similar cases by "releasing" probationary (and temporary) employees under article XIII, marking their papers accordingly, it would not, in the case of Cross, reverse the action taken; namely, recording that individual as having been discharged for good cause under article VIII.

The report does note that the Union did not grieve over the basic decision to terminate Cross. However, on the record before us, the reason for thus limiting the scope of the grievance remains a matter for speculation. Although the Respondent now contends that the Union's failure to grieve over the basic decision to let Cross go demonstrates that it waived that right during the give-and-take of bargaining, the Respondent's report is silent in this respect.[8] While it is conceivable that the Union may have acquiesced in the Respondent's view that article XIII permits the release of probationary (and temporary) employees without recourse to the grievance and arbitration provisions of their collective-bargaining agreement, it is just as plausible that the Union pressed only for Cross' termination under less prejudicial conditions because it viewed the evidence in its possession as warranting no further relief. Therefore even assuming that the Respondent's report contains no inaccuracies in the summary of what transpired between the parties in connection with the Cross grievance, this evidence falls far short of establishing that, thereafter, the Union clearly and unmistakably waived its right to grieve over the termination of temporary employees or to obtain information relevant to such a grievance.[9]

Neither are we willing to view article XIII itself as a waiver of such rights in view of the broad arbitration provision applicable hereto,[10] which permits arbitration of any grievance "involving alleged violations with respect to the application or interpretation of the terms" of the parties' collective-bargaining agreement.[11] It is, of course, possible that Mitchell's grievance may be deemed not cognizable under the contract here involved in view of the language contained in article XIII, pertaining to the Respondent's "exclusive right" to release probationary employees; but that question concerning arbitrability is not one for this forum to decide. Indeed, as we stated in *Safeway*,[12]

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sheets would enable the Union to weigh the merits of her underlying grievance before deciding whether or not to pursue the grievance at all. This, obviously, would foster rather than diminish the integrity of the grievance and arbitration process. Accordingly, we find that the information here in question falls clearly within the ambit of *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432 (1967), and that, absent waiver, the Respondent has a statutory duty to furnish it pursuant to the Union's request.

[4] There is no evidence that a copy of the report was ever tendered to the Union.

[5] This portion of the Respondent's report is quoted in its entirety in the section of the Administrative Law Judge's Decision entitled "Analysis."

[6] Art. XIII, sec. A, par. 1(b), provides that: "The Company shall have the exclusive right during this probationary period to release from the payroll any such employee found unsatisfactory."

[7] Art. VIII states that: "The Company retains the right to discharge or suspend all employees, but the Company shall not discharge or suspend any employee without just cause, and any such employee shall, at the time of his suspension or discharge, be given the reason therefor in writing, and the Union notified of such action. . . ."

[8] The Administrative Law Judge therefore errs insofar as he concludes that the Union agreed, much less contended, that temporary employees had no recourse through the Union in the event of their separation.

[9] Similarly, the failure of the Union to grieve specifically over the termination of probationary or temporary employees during the ensuing years would not cause us to reach a different conclusion, as the reasons therefor are likewise a matter for speculation.

[10] Art. VII, par. 1, of the parties' current collective-bargaining agreement states:

> Only grievances involving alleged violations with respect to the application or interpretation of the terms of this agreement may be submitted by either party to arbitration. The Arbitrator shall have no authority to add to, take from, change or modify any of the terms of this Agreement nor shall he have any authority in the making of a new Agreement.

[11] Cf. *Boston Mutual Life Insurance Company*, 170 NLRB 1672 (1968) wherein the Board found specifically that an arbitration provision "plainly restricts the arbitration coverage of the agreement to those employees who have completed their probationary period."

[12] *Safeway Stores, Inc.*, 236 NLRB 1126, fn. 1.

> . . . before a union is put to the effort of arbitrating even the question of arbitrability, it has a statutory right to potentially relevant information necessary to allow it to decide if the underlying grievances have merit and whether they should be pursued at all.

In sum, we find that the Union did not clearly and unmistakably waive its right to the information here in question and, accordingly, that by refusing to furnish such information to the Union pursuant to its request the Respondent failed to bargain collectively in violation of Section 8(a)(5) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, PPG Industries, Inc., New Martinsville, West Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Chemical Workers Union, Local 45, AFL-CIO, as the exclusive bargaining representative of its employees, by refusing to furnish it with requested information consisting of certain work evaluation reports, called rating sheets, and related documents pertaining to Emily Mitchell.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Furnish, upon request, to International Chemical Workers Union, Local 45, AFL-CIO, the work evaluation reports, called rating sheets, and related documents pertaining to Emily Mitchell.

(b) Post at its New Martinsville, West Virginia, plant copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with International Chemical Workers Union, Local 45, AFL-CIO, as the exclusive bargaining representative of our employees, by refusing to furnish it with requested information consisting of certain work evaluation reports, called rating sheets, and related documents pertaining to Emily Mitchell.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL, upon request, furnish to International Chemical Workers Union Local 45, AFL-CIO, the work evaluation reports, called rating sheets, and related documents pertaining to Emily Mitchell.

PPG INDUSTRIES, INC.

DECISION

STATEMENT OF THE CASE

CHARLES M. WILLIAMSON, Administrative Law Judge: This case was heard before me at Wheeling, West Virginia, on March 18, 1980, pursuant to a complaint and notice of hearing issued on October 31, 1979. The complaint was bottomed on a charge filed on September 10, 1979, alleging that PPG Industries, Inc., herein called Respondent, violated Section 8(a)(1) and (5) of the Act by its refusal to furnish the Charging Party certain rating sheets maintained by its supervisory force concerning the job performance of temporary employee Emily Mitchell.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel[1] and Respondent, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Pennsylvania corporation with facilities located in several States of the United States, is engaged

[1] This term is used to designate counsel for the General Counsel.

in the manufacture and nonretail sale of glass, paints, and related products. At all times material herein, Respondent, during the course of its operations, purchased goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Pennsylvania and the State of West Virginia, respectively, for use at its Pennsylvania and West Virginia facilities. During the same period of time, Respondent shipped goods and materials valued in excess of $50,000 from its New Martinsville, West Virginia, facility, which is the only facility involved in this proceeding, to points and places outside the State of West Virginia. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

Respondent admits, and I find, that the International Chemical Workers Union, Local 45, AFL-CIO, hereafter designated the Union, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Appropriate Unit*

The Respondent admits, and I find, that the Union has been, at all times material herein, the exclusive representative for purposes of collective bargaining of employees in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

The appropriate unit is as follows:[2]

> All of its production and maintenance employees at the Natrium Plant of P.P.G. Industries, Inc., Chemical Division, New Martinsville, West Virginia, including janitors, cleaners, and laboratory employees (analysts and sample carriers) but excluding all foremen, office clerical employees, plant clerical employees, chemists, technicians, guards, professional employees and supervisors as defined in the National Labor Relations Act, as amended.

B. *The Discharge of Emily Mitchell and the Union's Request for Information*

On May 15, 1979, Emily Mitchell, daughter of an environmental control specialist employed by Respondent, was hired as a temporary summer employee. Mitchell, a college student who planned to return to school in the fall, was assigned to Respondent's utility crew. At the time of hire, the Union was allowed to solicit membership from Mitchell and other summer temporary employees. Mitchell opted to join the Union. Union dues and initiation fees were deducted from her paychecks.

Mitchell was hired under a temporary summer employee program the Respondent has intermittently followed since the early 1940's. In the past 15 years, the practice has been to hire as summer temporary employees only college students related to individuals working on a permanent basis at Respondent's plant. The positions are divided between relatives of rank-and-file employees and supervisory personnel. Article XIII,A,1(c) of the current collective-bargaining contract permits the hire of employees on a temporary basis between May 15 and September 15 of any year. Such temporary employees must be apprised of their temporary status, indicated as "temporary" on the seniority roster, and are not permitted to bid on posted jobs. Any summer temporary employees who are transferred by Respondent from temporary to permanent status must be considered as new hires as of the date of the transfer. The Union must be notified of the transfer. (G.C. Exh. 2, art. XIII,A,1(c).) The significance of the transfer provision is found in General Counsel Exhibit 2, article XIII,A,1(a) and (b):

> 1. Plant seniority of an employee is measured by years, months and days from the start of his continuous service with the Company at its Natrium, West Virginia, plant.
>
> (a) New employees shall be considered as probationary employees for a period of sixty (60) days of work and shall not be considered as having any seniority until this period is satisfactorily completed, at which time seniority shall revert to his first day of work.
>
> (b) The Company shall have the exclusive right during his probationary period to release from the payroll any such employee found unsatisfactory.

Respondent released Mitchell from its employ on July 6, 1979.[3]

Following a telephone conversation with Mitchell, Local 45's then vice president, Melvin Montes, filed a grievance with the secretary of Respondent's director of labor relations on July 9, 1979. In pertinent part, that grievance (G.C. Exh. 3) states as follows:

> This grievance is being filed by Local 45, I.C.W.U., as per Article 8, paragraph 4, on behalf of Emily Mitchell who was discharged on Friday July 6. We believe this discharge was without "just cause" and is a violation of Article 8, paragraph 2.
>
> We also believe the Company's failure to give written notice of their reasons for this action to the employee and to the Union is a further violation of Article 8, paragraph 4.

Article 8, paragraph 4, of the collective-bargaining agreement provides, *inter alia*, that disciplinary action taken against an employee "involving suspension and discharge" may be submitted at the second step of the

[2] There are minor variances between the unit as pled in the complaint and that set forth in the latest collective-bargaining contract between the Union and Respondent. See G.C. Exh. 2, art. II, p. 2. The parties agreed, at my suggestion, that the unit set forth in the collective-bargaining agreement should take precedence in the event the variances became material in the decision of the issues. The unit set forth above is the one in G.C. Exh. 2, art. II. I do not find the variances to be matters of substance.

[3] General Counsel contends in his brief that Mitchell was "terminated." As will be seen, *infra*, the collective-bargaining agreement makes meaningful distinctions between "discharge" and "release." "Termination" is nowhere used in that agreement in this context.

grievance procedure. Article 8,[4] paragraph 2, which Montes alleged was violated by Mitchell's discharge, states as follows:

> 2. The Company shall not discharge, suspend, or discipline any employee without just cause, and any such employee shall, within twenty-four (24) hours of his suspension or discharge, be given the reason therefor in writing, and the Union notified of such action. If the Company determines that a meeting to review the incident is to be held, such meeting shall be held within ninety-six (96) hours of an alleged violation. . . . If an investigation proves that a discharge was without just cause, Management shall reinstate said employee and pay full compensation at his regular rate for time lost and return to him all seniority rights; but if the investigation shows that the discharge should be converted into some lesser form of disciplinary action, the determination of any compensation for time lost should be discussed between the Company and Union with an effort made to arrive at a mutually satisfactory settlement. Within forty-eight (48) hours after the close of a review meeting, or if no meeting is held, within ninety-six (96) hours of the suspension or discharge, the Union and the employee shall be given a written notification of the charges and action taken.

On July 10, 1979, Montes called JoAnn McElway, the secretary to Respondent's director of labor relations, Fauber. He requested of McElway "any information, including rating sheets that the company had used in sustaining the *discharge* of Emily Mitchell. . . ." (Emphasis supplied.) McElway stated that she would pass the request along to Fauber but that she "doubted seriously if we would get that information."[5] When Montes talked personally with McElway the next day, July 11, 1979, McElway told him that Fauber had decided not to give the Union the information. McElway asserted that Fauber had told her temporary employees were not covered under the bargaining agreement. As a result of what McElway told him on July 11, 1979, Montes presented a written request on July 16, 1979, for information relating to Mitchell's case. This request was given to Respondent's officials, Richard Cole and Jim Fauber, at a meeting set up to determine the agenda for a regular union-management meeting to follow the next day. According to Montes neither Cole nor Fauber responded to the written request. This request (G.C. Exh. 4) states as follows:

> For the Union to process and attempt to settle G-38 on behalf of Union member Emily Mitchell it is necessary that we be furnished any written material, such as work related rating sheets or anything else that may have been used to sustain her discharge.
>
> I made the request for these materials over the telephone to Jo Ann on July 10, 1979. This request was later denied. I am again making the request for information and ask that the Company please reconsider its position.

After further correspondence between the Respondent and the Union (G.C. Exh. 5) on the Mitchell case, Richard Cole, Respondent's assistant director of employee relations, wrote then president of the Union local, Joe Williams, on August 23, 1979 (G.C. Exh. 6):

> The purpose of this letter is to respond to your memo of August 8, 1979.
>
> It is the Company's position as authorized by the Labor agreement, for probationary employees and not restricted by it for temporary employees and heretofore accepted in practice, that an employee not having seniority status may be released any time at the Company's discretion. Additionally, that this exclusive right of management is not subject to review in the grievance procedure or arbitration. I trust this will clarify the Company's position and resolve this issue.

The record is clear that neither the rating sheets nor any other form of documentation having to do with Mitchell's case has been provided the Union.

C. *Contentions of the Parties*

The General Counsel contends that the requested information is relevant to Mitchell's grievance and arbitration proceeding and that Respondent is therefore obligated to provide it under principles established in *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432, 447–448 (1967), and *Worcester Polytechnic Institute*, 213 NLRB 306, 308 (1974). Respondent argues that the General Counsel has not met the burden of showing that the rating sheets are relevant to the Mitchell proceeding; that if ever the Union had a right to the information, that right has been waived; that a finding of violation of Section 8(a)(1) and (5) would necessarily result in a finding that temporary employees constitute a portion of the unit appropriate for purposes of collective bargaining and thus erode the principles of Section 7, 8, and 9 of the Act; and that there is no statutory duty on the part of an employer to turn over to a collective-bargaining representative, at its request, all evidence in its possession relating to a grievance which the collective-bargaining representative believes may be "relevant."

D. *Analysis*

For the reasons set forth below, I find that the complaint must be dismissed because the Union waived its right to the production of the rating sheets and other

[4] The contract employs Roman numerals and the grievance quoted above employs Arabic numerals to designate the respective articles of the contract. In the context of discussing the grievance, I will employ Montes' usage.

[5] Rating sheets are kept by Respondent's supervisors on all employees. They contain supervisors' periodic comments and evaluations of employee job performance. Mitchell's rating sheets were subpenaed and are in the record as G.C. Exh. 8(a)–(d). The sheets for temporary summer employees are done on the same form as those for probationary and regular full-time employees as it is not worthwhile for Respondent to create a separate form for the temporary employees who are relatively few in number.

documentation relating to Mitchell's release. This waiver occurred because the Union, in 1956, gave up its right to file grievances and proceed to arbitration in cases involving summer temporary employees.

An employer has a duty to furnish information to a collective-bargaining representative so that the representative can intelligently decide whether to proceed on a grievance. *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432 (1967); *Safeway Stores, Inc.*, 236 NLRB 1126 (1978); *Worcester Polytechnic Institute*, 213 NLRB 306 (1974); *The Timken Roller Bearing Company*, 138 NLRB 15 (1962), enfd. 325 F.2d 746 (6th Cir. 1963). This duty is based on not only a policy that a party opponent is entitled to relevant information to evaluate its position, but also on the proposition that an exchange of information may eliminate nonmeritorious grievances. As the Supreme Court has stated in the *Acme* case, *supra*:

> Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened. . . . It [Respondent's refusal to provide relevant information] would force the Union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim.

The threshold decision as to the relevancy of the requested information is to be made by the Board. *N.L.R.B.* v. *Acme Industrial Co., supra; Tool and Die Makers' Lodge No. 78 of District No. 10 of the International Asssociation of Machinists and Aerospace Workers, AFL-CIO (Square D Company, Milwaukee Plant)*, 224 NLRB 111 (1976) (an 8(b)(3) case involving a Union's refusal to provide information but decided on ground that relevancy of desired information was to be determined by Board and not by subjective opinion of one of the parties.) The standard of relevancy is a broad one. *Acme*, quoting, 4 Moore, *Federal Practice*, Section 26.16[1], pp. 1175–76 (2d ed. 1957), makes it a "discovery type standard" based "upon the probability that the desired information was relevant. . . ." See *Safeway Stores, Inc.*, 236 NLRB 1126, 1128 (1978), a discussion by Administrative Law Judge Russell L. Stevens affirmed by the Board. In the instant case this, "threshold decision" as to relevancy is not difficult to make. The rating sheets involved are in evidence as General Counsel Exhibit 8(a)-(d). They contain supervisory comments on Mitchell's job performance which would clearly be relevant to a decision to end her employment. That Respondent has chosen, as a policy, not to use these documents in arbitration proceedings does not, as it argues in its brief, make their content irrelevant. Respondent's argument makes one of the parties to a dispute the arbiter of relevancy. This proposition contradicts the teachings of the *Acme* and *Tool and Die Makers'* cases.[6] Respondent's argument that Mitchell already knew and had conveyed to the Union the reasons for her severance is equally unavailing. *AMCAR Division, ACF Industries, Inc.*, 231 NLRB 83, 93 (1977); *The Kroger Company*, 226 NLRB 512 (1976).

The Union and Respondent dealt with the question of temporary and probationary employees in 1956. On July 27, 1956, temporary employees R. Lee Cross and Franklin Johnson were discharged by the Respondent. (Resp. Exh. 12.) Nothing further was heard of Johnson, but Cross wrote a letter to Respondent on July 28, 1956, protesting his discharge "which was given without explanation or just cause." (Resp. Exh. 9.) At a union management meeting on August 9, 1956, the Union brought to the Respondent's attention the fact that Cross and Johnson were designated "discharged" at the time of their separation and that this procedure was improper under the then existing collective-bargaining contract. The Union contended "that plant probationary employees who are separated from the payroll *without recourse* do not fall within the provisions of Article VIII, but rather fall within the provisions of Article XIII, Section A-1, a and b." (Emphasis supplied.) The Union then suggested that the "Company adopt the procedure of separating these people on the basis of 'release' and that the stamp quoting the provisions of Article VIII of the contract be remained from the separation papers on any such plant probationary employee so separated." Respondent stated that they were in basic agreement but wanted to check to determine "if this will in any way affect a separated plant probationary employee's unemployment compensation benefits." (Resp. Exh. 5, p. 2.) On August 21, 1956, the parties agreed on a procedure to be followed thereafter[7] (Resp. Exh. 6):

> DISCHARGE OF PLANT PROBATIONARY EMPLOYEES: (Re Vol. III, No. 40 August 9, 1956, page two.) It will be remembered that at the last regular meeting the Union said that our procedure of terminating plant probationary employees on a "discharge" basis was in conflict with Article XIII, Section A-1(a) and (b), of the Contract. It is their contention that termination of these employees should be on a "release" basis. It has been our past practice to separate these probationary employees as "discharged." At the last meeting, the Company agreed to check with the West Virginia Unemployment Compensation Bureau to determine whether change in terminology on separation papers would in any way affect the compensation benefits due these people. The Union at this time inquired as to our findings. The Union was told that separating plant probationary employees on a "release" basis and marking their papers accordingly will in no way affect these benefits. Consequently, in the future, when a new employee within his probationary period is found to

[6] Respondent did not make, nor have I considered, the argument that the grievance involved refers to Mitchell's discharge as failing to meet the "just cause" standard of the contract whereas Mitchell, as a summer temporary employee, may not have been eligible for the protections of the "just cause" standard. If Mitchell was not so eligible, information sought by the Union to evaluate "just cause" would be, strictly speaking, irrelevant. As the argument depends on Mitchell's status—a result of collective bargaining—I believe it to be more appropriately cast in the form of discussion concerning waiver.

[7] The contemporary contract is in evidence as Resp. Exh. 7. Its relevant terms do not differ materially from the current contract.

be unsatisfactory, he will be separated as "released" and his papers marked accordingly.

This controversy arose over the recent discharge of two young plant probationary employees. Their separation papers were marked "discharge" and the provisions of Article VIII, concerning recourse through the Union for discharge had been stamped on the papers. One of these young men, ex-employee R. Lee Cross, took advantage of the citation of Article VIII, and filed a protest. The Union does not contend that we must process his grievance but states that we should mark his papers "released," without reference to Article VIII of the Contract. As mentioned in the foregoing paragraph, the Company is willing to disregard its prior practice in this respect and will process future cases as suggested by the Union. However, the Company will not at this time reverse its position on the Lee Cross discharge. Matter closed.

While the above discussions refer to "probationary" employees, other evidence makes it clear that Cross and Johnson were temporary employees of the same status as Mitchell. Respondent's witness Fauber so testified and I credit him. Additionally, Respondent Exhibit 8, the 1956 discharge slip of Cross, clearly shows him as a member of the Respondent's utility crew designated "Temp." (for temporary).[8] Respondent Exhibit 10 is a letter written to Cross by Respondent's then Assistant to Director of Industrial Relations Albert E. Alba on August 6, 1956, 3 days prior to the August 9, 1956, meeting discussed above. Copies of this letter were sent to Union Official J. L. Batton who was present for the Union at the August 9 and 21, 1956, meetings between the parties. While Respondent Exhibit 10 implies in its first paragraph that Cross was in probationary status as of the time of his discharge, the third paragraph specifically identifies him as being "on temporary status." See also Respondent Exhibit 12 where both Cross and Johnson, the two dischargees of July 27, 1956, are identified as "temporary employees."

Respondent's witness Fauber, when questioned about the simultaneous use in 1956 of the terms "probationary" and "temporary" to classify employee Cross, credibly testified:

> The temporary employees were, as now, on a temporary status and were not under probation and at that time [1956] if a temporary employee had his service terminated, he was classified as being discharged to the same extent that a probationary employee could be discharged *without recourse*. [Emphasis supplied.]

This testimony was undenied and is consistent with the usage of the parties to the August 1956 conversations which group "probationary" and "temporary" employees (such as R. Lee Cross) in the same functional category under the collective-bargaining contract—those without "recourse through the Union for discharge. (See Resp. Exh. 6.) I therefore find that in 1956 the parties (1) grouped together "probationary" and "temporary" employees as regards their right to recourse through the Union in the event such employees should be separated from Respondent's employ; (2) the Union agreed (indeed, it contended) that employees in these categories had no recourse through the Union in the event of their separation; and (3) employees in the "probationary" and "temporary" categories were to be "released" rather than "discharged," the difference in wording reflecting a real difference in the right under the contract to employ the grievance and arbitration procedures. These findings are consistent with the wording of the agreement between the parties which at article XIII, A(1)(b), refers to "release" of probationary employees and at article VIII refers to "discharge" of employees.

A contrary finding that temporary employees have recourse to the grievance and arbitration procedure would result in an anomalous situation whereby such temporary summer employees would possess rights under the contract in excess of regular long-term employees during the 60-day probationary period. While such a contract is not beyond the legal power of the parties to create, I find it exceedingly doubtful that they intended to create this result purely by verbal implication.[9]

Accordingly, I find that the Union, by its conduct at the August, 1956 meetings and subsequent collateral practice[10] in regard to temporary and probationary employees, clearly waived its right to contest Mitchell's separation under the grievance and arbitration provisions of the contract. Under these circumstances, I do not find that it will effectuate the policies of the Act to employ the coercions of Section 8(a)(1) and (5) to order a Respondent with a 36-year history of peaceful collective bargaining at this location to produce information concerning a subject so waived. *Boston Mutual Life Insurance Company*, 170 NLRB 1672 (1968).

[8] The "discharge stamp" at which the Union took offense in the August 6, 1956, meeting appears on Resp. Exh. 8.

[9] The General Counsel addressed himself to this dilemma in his brief. He could only resolve it by denying that the 1956 negotiations between the parties left probationary employees without recourse to the Union in the event of their release. This cutting of the Gordian knot I find completely contradictory to the undenied evidence of Resp. Exh. 6. The General Counsel also surmised that the wording of article XIII of the contract showed that Respondent's "exclusive right" to release probationers was limited by the phrase "found unsatisfactory." He then reasons that the inclusion of this limitation "implies" that any employee who feels it "has been violated" may protest through the grievance and arbitration procedure. I do not read "found unsatisfactory" as a limitation. Additionally, I find no evidence that the parties intended to set up two separate standards for "discharge" and "release" under the grievance and arbitration procedure, one of "just cause" and the other of "satisfaction." Finally, the General Counsel's surmise ignores the Union's conduct in 1956 and the undenied fact that no grievance involving the release of a probationary employee has ever been filed by the Union.

[10] It is well settled that in ambiguous contractual situations, the Board will look to collateral evidence of the intent of the parties. *W-1 Canteen Service, Inc.*, 238 NLRB 609 (1978), and cases cited therein (intent of no-strike clauses).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent has not engaged in the unfair labor practice alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]